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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

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No. 25

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HOWARD JOSEPH WHITEHILL, *Appellant*,

v.

WILSON ELKINS, ET AL., *Appellees*.

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**On Appeal from the United States District Court for the District of Maryland**

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## BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE

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## BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE

The American Association of University Professors appears *amicus*, with consent of all parties, in support of the position advanced by appellants.

### INTEREST OF AMICUS

The American Association of University Professors is the national professional organization of teachers and research scholars in all disciplines at accredited colleges and universities in the United States. It has 1036 chapters and over 80,000 members in such institutions. It is estimated that such membership constitutes approximately 30 per cent of total full-time faculty in accredited institutions of higher learning.

The Association and its members have a significant interest in the present case because the statute, which

refers specifically to teachers in state institutions—as if to emphasize its application to education, including higher education—seriously threatens academic freedom and the liberties of college and university professors. This threat is particularly acute with respect to present and prospective members of the academic profession who live and teach in the State of Maryland, and may naturally be expected to receive opportunities for employment at the State University. The academic profession is in a very real sense a nation-wide one, however. It depends for its opportunities and the fulfilment of its mission on the policies and activities of institutions of higher learning in all states.

The conscientious inability of this appellant to execute the required certificate by no means stands alone. A former president of the American Association of University Professors, then a member of the faculty of Johns Hopkins, was prevented by the required oath from serving the State of Maryland in an advisory capacity in 1960. See 46 A.A.U.P. Bull. 290 (1960). His action called attention to the threat posed by the Ober Law and other similar statutes. This threat has undoubtedly caused major loss to the University, to higher education in general, and to the entire academic profession.

The Association, through a special committee and participation in litigation wherever possible, seeks to challenge such laws. Most recently, the Association filed a brief *amicus curiae* in this Court in *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967). That brief detailed more extensively the nature and history of the Association's long concern with loyalty-security laws which jeopardize academic freedom. The reasons for its concern have nowhere been more forcefully stated

than in this Court's opinion in the *Keyishian* case, *supra* at 603:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "market place of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection". . . .

## STATEMENT OF FACTS

The appellant was denied a teaching position at the University of Maryland solely because of his conscientious refusal to sign the Certificate of Application for Public Employment which accompanied the offer. The Certificate requires the applicant to certify that he is "not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence," subject to the penalties of perjury prescribed by Maryland law. All prerequisites had been met, and negotiations between appellant and University officials were complete, when the troublesome matter of the oath arose unexpectedly. That barrier to Maryland state employment was based upon the Attorney General's interpretation of the Subversive Activities Law of 1949 (commonly called the Ober Law). A brief analysis of the provisions of that

statute seems essential before developing the argument of *amicus curiae*, (*Amicus* will rely in other respects upon the statement of the facts contained in appellant's brief.)

Several sections of the Ober Law are especially relevant to this case. Section 10 declares ineligible for public employment any person who is a "subversive person"—a term which is defined at several places in the statute. Section 13 requires every state employee and applicant for state employment to submit a written statement—subject to penalties for perjury—that he is not a "subversive person." Section 11 requires government agencies to adopt procedures to ensure that no "subversive persons" will be employed by the State. (Under section 12, alternative procedures may be adopted for "laborers" where the employing agency determines that the nature of their work does not sufficiently jeopardize the security of the State.)

Section 14 provides for the dismissal of any person whom the employing agency reasonably believes to be a "subversive person." Specific procedures for the conduct of discharge hearings are detailed in that section. Any person so discharged may appeal the administrative decision to a state court. Finally, section 15 requires candidates for elective office to sign a certificate similar to that which section 13 requires of applicants for appointive positions.

The Ober Law was enacted in 1949. Several test cases rapidly brought the constitutionality of this law before the Maryland courts. These early tests chiefly involved the application of section 15 to candidates for elective office. In *Shub* v. *Simpson*, 196 Md. 177, 76 A.2d 332 (1950), *appeal dismissed*, 340 U.S. 881 (1950), the Maryland Court of Appeals sustained that section

against several constitutional challenges. Many of those challenges have no bearing upon the present case. Directly apposite, however, was the appeal taken to this Court by one party to a companion case, *Gerende* v. *Board of Supervisors,* 341 U.S. 56 (1951). A *per curiam* opinion of this Court affirmed the Maryland judgment. Reliance was placed upon a narrowing construction of the Ober Law, suggested both by the Maryland Court's *Shub* opinion and by the State Attorney General at the bar of this Court.

The Maryland Court of Appeals had suggested that the purpose of the Ober Law was identical to the purpose of a contemporaneous state constitutional amendment—"to prevent infiltration in our state, county, or municipal governments of persons who are engaged in one way or another in the attempt to overthrow the government *by force or violence.*" *Shub* v. *Simpson, supra* at 192, 76 A.2d at 338 (italics in original). This Court thus read the *Shub* decision as holding that, to obtain a place on the Maryland ballot, a candidate need only "make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt." 341 U.S. at 56-57 (italics in original). The Court also relied upon the Attorney General's declaration that "he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement." *Id.* at 57. There have been no subsequent cases either in the Maryland courts or in this Court involving the key provisions of the Ober Law.

There have, however, been several quite relevant administrative decisions and actions which bear upon this

case. Following this Court's April 1966 decision in *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966), Maryland's Attorney General revised the terms of the required loyalty certificate. This revision deleted the disclaimer of membership in "subversive organizations." The revision was effected after consultation with the draftsman of the Ober Law. Attorney General Finan announced in a press release on May 3, 1966, that he and former representative Ober felt the new certificate "complies with the most recent decision of the United States Supreme Court in the case of *Elfbrandt* v. *Russell* . . .". At no time were the courts or the legislature, nor even the Governor, formally involved in this revision (although the Governor was eventually apprised of the change by letter).

In the spring of 1966 the Attorney General announced another change in his interpretation of the Ober Law. For the first time since 1950, a candidate for Congress from Maryland was permitted to file without signing the loyalty oath. This change occurred when the Attorney General's office reversed an opinion—announced earlier that very week—and ruled that candidates for *federal* offices could not be subjected to the oath requirement. N. Y. Times, May 1, 1967, p. 60, col. 1. Ironically, this change reflected the qualification which the Maryland Court of Appeals had placed upon the Ober Law fully seventeen years earlier, in the *Shub* decision.

The decision below, *Whitehill* v. *Elkins*, 258 F. Supp. 589 (D. Md. 1966), is the first judicial construction of the oath since the *Shub* and *Gerende* decisions. Despite the profound changes in relevant constitutional law which have intervened, the court below sustained the oath on authority of *Gerende*. It therefore did not

reach the constitutional questions surrounding the terms of the Ober Law. All three members of the district court concurred in this disposition. Circuit Judge Sobeloff, however, expressed reservations both about the soundness of *Gerende* and about the constitutionality of the oath apart from that precedent. But he added that any rejection of or departure from *Gerende* must come from this Court. This appeal thus squarely presents important questions about the relevance and current status of the *Gerende* case.

## SUMMARY OF ARGUMENT

*Amicus curiae* will contend that the constitutionality of the Ober Law is squarely and inescapably before this Court. Notwithstanding the *Gerende* decision, we shall contend that the operative terms of the Ober Law upon which the loyalty oath requirement is based are clearly unconstitutional under recent decisions of this Court. Because of the close interdependence of the statute and the certificate, and the history of the Maryland loyalty oath, the two cannot validly be separated as the district court sought to do. Thus the oath requirement, and the statute upon which it rests, infringe upon the liberties of members of the academic community and other Maryland government employees.

Even if only the language of the certificate were now before this Court, we would contend that Maryland has imposed an unconstitutional condition upon academic and other public employment. Several contentions support this conclusion: First, the central terms of the oath—particularly the phrase "in one way or another"—are unconstitutionally vague. Second, the statute provides no procedure by which a non-signer

may demonstrate his loyalty or his fitness for employment. Third, the certificate is unconstitutional because there are regulatory devices available to serve essentially the same goals—to the extent the State may constitutionally pursue them. Such devices pose no sweeping hazards to freedom, especially to academic freedom when teachers are involved, as in the present case. For these three reasons we contend that the certificate, apart from the underlying statute, violates the First and Fourteenth Amendments of the United States Constitution. We would urge, however, that the constitutionality of statute and oath must be considered together, because of their integral relationship, and not separately.

## ARGUMENT

### I. THE LOYALTY OATH REQUIREMENTS OF THE OBER LAW ARE PROPERLY BEFORE THIS COURT AND ARE CLEARLY UNCONSTITUTIONAL.

#### A. This Appeal Directly Challenges the Constitutionality of the Relevant Provisions of the Ober Law

The District Court declined to reach the terms of the Maryland statute because of this Court's decision in *Gerende* v. *Board of Supervisors, supra.* In that case, this Court deemed it unnecessary to consider the constitutionality of the Ober Law's disclaimer provisions. This abstention was based upon a reading of the Maryland opinion in *Shub* v. *Simpson, supra,* and the State Attorney General's representations during oral argument. We contend in Section I of this brief that *Gerende* should no longer be read as authority for divorcing the language of the oath certificate from that of the statute. If it must be so read, then we urge that *Gerende* should be overruled because it is inconsistent with present constitutional doctrine.

**1. Gerende Did Not Consider and Approve the Constitutionality of the Oath Certificate Apart from the Ober Law.** This Court recently noted the limited scope of the *Gerende* decision. A footnote in *Baggett* v. *Bullitt*, 377 U.S. 360, 368 n.7 (1964) recalls that "the Court [in *Gerende*] . . . did not pass upon or approve the definitions of subversive person and organization contained in the Maryland statutes." It seems equally clear that the Court did not squarely uphold the language of the present oath certificate isolated from the questionable provisions of the Ober Law. Several factors support this contention.

After the Attorney General offered his narrowing construction during oral argument, this Court properly went no further than to hold that a constitutional decision would be premature at that time. The narrower language on which the Attorney General relied had been suggested by the Maryland Court of Appeals, but had not yet been fashioned into an oath or certificate. If this Court had meant to sustain the language of the present certificate on the merits, it would presumably have invited further argument and briefing of that issue. Presumably, too, it would have cited some authority to bolster so significant a constitutional judgment. The absence of either invitation for re-argument after the Attorney General's suggestion, or any discussion of constitutional principles in the brief *per curiam* opinion, suggests that *Gerende* in fact postponed, rather than adjudicated, the constitutional questions which are presented here.

There is a second reason why *Gerende* should not be read as precedent for judging the certificate in isolation from the Ober Law. The opinions of the Maryland Court of Appeals, upon which this Court partially

relied in *Gerende,* were ambiguous on this question to a degree that precludes clear characterization. At various places in the *Shub* opinion, the Maryland court seemingly sustained the vague terms "subversive person" and "subversive organization"; explicit references to those provisions are not wanting. The concluding portion of the opinion seems, however, to have assumed that the narrowing construction was essential to the validity of the Ober Law. Yet the certificate embodying that language was not yet in existence; the more felicitous phrasing was merely a judicial suggestion. Thus it would appear that this Court would have wanted clearer signals from below before sustaining on the merits, as the State's loyalty oath, a disclaimer which had not even been passed upon squarely by the state courts. For both these reasons, the summary opinion in *Gerende* should be read only as a postponement of the constitutional issues until the proposed language had been adopted as the State's loyalty oath and required of applicants or candidates. Nothing in that case warrants the divorce of oath from statute which the district court decreed in the present case.

Even if *Gerende* be read as allowing the separation of the oath from the statute, there is an important additional reason why it does not control the present case. The constitutional attacks in *Shub* and *Gerende* were mounted by candidates for *elective* offices. Their concern was with the oath required by section 15, rather than with the provisions of sections 11-13, which presumably underlie the oath demanded of *appointed* officials. While the coverage of the two sections is virtually identical, there is one basic difference: While an elective official or candidate need only file the oath

before seeking office, the appointed official remains subject to the disqualifying provisions of the Ober Law throughout his service to the State. For the political candidate, therefore, filing the oath is the end of his concern with the Ober Law; for the appointed official, it is but the beginning of a possibly life-long concern with Maryland's loyalty-security arrangement. The rules and regulations which section 11 requires each public agency to promulgate attest to the continuing concern of the government with the loyalty of its employees.

Such continuing surveillance as the Ober Law imposes upon appointed officials is particularly hostile to academic freedom. The fear of dismissal is particularly acute in the academic profession. For, as a distinguished educator has recently observed, "More than in most other occupations, the dismissal of a professor jeopardizes or destroys his eligibility for another position in his occupation. . . . If he loses his position for what he writes or says, he will, as a rule, have to leave his profession, and may no longer be able effectively to question and challenge accepted doctrines or effectively to defend challenged doctrines." Machlup, *On Some Misconceptions Concerning Academic Freedom,* 41 A.A.U.P. Bull. 753, 756 (1955). It was a similar kind of surveillance which this Court condemned in *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957). The plurality opinion of the Chief Justice is particularly apposite:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait-jacket upon the

> intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Thus, even if *Gerende* did uphold the attempted separation of the political candidate's oath from the Ober Law, there are important reasons why the question presented here is a distinctly different one. Not only does this oath apply to appointive officials; more important, the application of the oath, with its attendant surveillance procedures, to an academic employee makes it particularly offensive in a way that could not have been considered in *Shub* and *Gerende*.

2. **The Constitutionality of the Oath Certificate Cannot Logically Be Judged Apart from the Underlying Provisions of the Statute.** Whatever *Gerende* may have held, it is illogical in light of recent constitutional developments to judge the oath certificate without appraising the relevant portions of the Ober Law. Several considerations warrant an integral view of oath and statute. First, the statute affords the only possible basis in state law for imposing the oath requirement. As Judge Sobeloff recognized in his concurring opinion below, arguably the oath should not "be judged in isolation, but in conjunction with the statute, for in the absence of a statute, there would be no authority for demanding any statement. . . ." 258 F. Supp. at 597 (concurring opinion). Second, the certificate itself invokes the authority of the statute as its raison d'être. Immediately below the heading on the certificate form appears the phrase "Required by law (Art. 85A, paragraps 13, Annotated Code of Maryland, 1957)." No

recognition of the close interdependence of oath and statute could be clearer than this—contained as it is in the very certificate which appellees seek to divorce from its legislative foundation.

Third, the severability clause (section 18) of the Ober Law is wholly irrelevant here. Even if severance might be appropriate, *cf. Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), the instant question is not one of severability at all. The effort here is not to rescue one part of a statute from a judgment invalidating another part of the same law. Rather the issue is whether to judge a persistent, though informal, administrative implementation and enforcement of a statute in context of a clearly unconstitutional statutory authorization. Any reference to severability in this setting is therefore wholly inappropriate.

Finally, the relationship between oath and statute here is analogous to that involved in *Elfbrandt* v. *Russell, supra.* The oath involved in that case was innocuous enough standing alone. It was held unconstitutional, however, because a statutory gloss added after the original enactment gave a new and far more pervasive meaning to its once innocent provisions. This Court could hardly have overlooked the statutory gloss in judging the validity of the bare oath. Here too the terms of the statute, although enacted before rather than after the promulgation of the oath, should be judged as though they were found in the same legal document.

3. **Separation of the Oath From the Ober Law Perpetuates the Uncertainty and Ambiguity Surrounding the Statute and Its History.** As the opinions of the court below reveal, there is grave uncertainty about

the relationship between the Ober Law and the oath. A public employee might well assume that by signing the oath certificate he had complied with the terms of the Ober Law. He might equally wonder whether more would not later be asked of him, in view of the dissonance between the statute's broad terms and the oath's more specific language. The representations of an earlier Attorney General and the short *per curiam* opinion of this Court in *Gerende* afford meager assurance to one who is truly concerned about the meaning of his pledge, and who is sincerely anxious to comply with all applicable laws.

The contention of the State here, as in *Baggett* v. *Bullitt, supra,* "ignores not only the effect of the oath on those who will not solemnly swear unless they can do so honestly and without prevarication and reservation, but also its effect on those who believe the written law means what it says. . . . Even if it can be said that a conviction for falsely taking this oath would not be sustained, the possibility of a prosecution cannot be gainsaid." 377 U.S. at 374. Earlier this year, in *Keyishian* v. *Board of Regents, supra,* this Court displayed similar concern for the conscientious public employee confronted with an ambiguous and confusing loyalty-security law: "It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery." 385 U.S. at 601. As *Keyishian* and other recent decisions of this Court make eloquently clear, the risks are greater, and the reluctance consequently more understandable, when the applicant is a member of the academic profession. And when academic personnel are deterred by such doubts

and cautions, not only the profession but the entire nation suffers, for "academic freedom . . . . is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian* v. *Board of Regents, supra* at 603.

Such doubts and fears seem even more likely in Maryland than they might have been among Washington or New York public employees. Not only does Maryland's certificate rest upon a very slender reed, but the several administrative revisions it has undergone warrant even greater doubts for the future. In the absence of any official action by other branches of the state government, might a public employee reasonably wonder whether a change in administration at Annapolis might undermine the interpretation given by a previous Attorney General?

In fact, the language of the oath which appellant refused to sign is not even the language suggested at the time of *Gerende* and originally fashioned into the oath certificate. The nature of the change was rather minor, to be sure. The informality and rather haphazard process by which the change was effected—consultation between the Attorney General and the draftsman of the statute, a former legislator—is far more revealing than the resulting revision of the wording. The two ingredients combine, however, to reinforce the doubts created by a widening gap between the language of the statute and of the oath certificate. To place the burden of resolving those doubts upon the applicant for employment may well exclude from public service many persons who are unwilling to incur the risks of calling close questions in their own favor.

**4. The Promulgation of the Certificate Raises Serious Constitutional Questions About the Delegation of Legislative Authority.** Here, as in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), the legislature has not specifically authorized the administrative action taken by the Attorney General. And as in *Sweezy*, that action directly affects the sensitive area of internal security and free expression. Whether the Maryland legislature would ratify this certificate, or would have preferred some other form of oath, we have no way of knowing. Thus, one ground on which a plurality of this Court invalidated the New Hampshire Attorney General's investigation in *Sweezy* seems directly apposite:

> Separating the wheat from the chaff, from the standpoint of the legislature's object, is the legislature's responsibility because it alone can make that judgment. In this case, the . . . legislature has delegated that task to the Attorney General.
>
> As a result, neither we nor the state courts have any assurance that the questions petitioner refused to answer fall into a category of matters upon which the legislature wanted to be informed when it initiated this inquiry .... The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority. (354 U.S. at 254)

### B. The Loyalty Oath Provisions of the Ober Law Clearly Violate the First and Fourteenth Amendments

The restrictions imposed by sections 11-13 and 15 of the Ober Law are virtually indistinguishable from those held unconstitutional in *Baggett* v. *Bullitt, supra.* That decision found the very terms that are central to the Ober Law's disclaimer—"subversive persons" and

"subversive organization"—to be fatally vague and uncertain. Here, as in *Baggett* and *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961), the statutory terms afford no guidance to the applicant as to what he must disclaim or foreswear when he enters government service. A broad range of activities and affiliations—some within the reach of state prohibitory power, but most constitutionally protected—is potentially covered by such terms. Whatever power the State may have to deny government employment to persons who seriously threaten the security of the government, "measures which purport to define disloyalty must allow public servants to know what is and what is not disloyal." *Baggett* v. *Bullitt, supra* at 380. Thus there can be no doubt about the unconstitutionality of the only terms of the Ober Law that are relevant to the loyalty oath requirement.

## II. THE TERMS OF THE OATH CERTIFICATE ARE UNCONSTITUTIONAL EVEN IF THE UNDERLYING STATUTORY PROVISIONS ARE NOT IN ISSUE.

### A. The Terms of the Certificate Are Unconstitutionally Vague

Although the Maryland oath certificate may be briefer and less elaborate than other oaths which this Court has recently struck down, its terms are nevertheless unconstitutionally vague. The vagueness derives chiefly from the expansive and elusive phrase, "in one way or another"; the applicant must swear that he is not "engaged in one way or another in the attempt to overthrow the government . . . by force or violence." That phrase might possibly be confined to overt activities for which one can be prosecuted under existing internal security laws, *cf. Scales* v. *United States,* 367 U.S. 203 (1961). An equally plausible construction would, however, include a wide range of activities

which may not be constitutionally proscribed. A person who is a mere knowing member of a subversive organization might well be held to be "engaged in one way or another" in attempting to overthrow the government. Such knowing membership may not constitutionally be proscribed as a condition of public employment, *Elfbrandt* v. *Russell, supra; Keyishian* v. *Board of Regents, supra.*

Many other forms of constitutionally protected activity and affiliation might conceivably be reached—particularly in light of the tortuous history of the certificate. While many of the possible constructions may seem far-fetched, "[t]he very absurdity of these possibilities brings into focus the extraordinary ambiguity of the statutory language. With such vagaries in mind, it is not unrealistic to suggest that the compulsion of this oath provision might weigh most heavily upon those whose conscientious scruples were the most sensitive." *Cramp* v. *Board of Public Instruction, supra* at 286.

The vagueness of the oath is made even more serious by the absence of any state court decisions defining its scope. The Maryland courts have not spoken on the question since they suggested some 17 years ago the very language now embodied in the certificate. Those cases were decided in a constitutional framework radically different from the context within which this case arises. Allegedly subversive activities which might once have justified even criminal sanctions may no longer serve as grounds for disqualification from public employment or other government benefits. Yet the Maryland oath still contains language which was deemed a constitutional exercise of the State's power

at that much earlier time. Those words can be adapted to fit the new constitutional framework only by attributing to them a flexibility which renders them even vaguer than they appear on the face of the oath.

Thus the key phrase of Maryland's oath turns out to be no more precise or informative than the language which this Court held unconstitutionally vague in *Cramp* and *Baggett*. Doubts which might reasonably have plagued an applicant for public employment in Florida or Washington might equally concern his Maryland counterpart. Nothing in the oath or its history assures the signer that its interpretation and enforcement will be confined to activities which the State may constitutionally reach. So long as the phrase "engaged in one way or another" remains at large, the oath certificate cannot survive even if it is isolated from the taint of the statutory language.

Any suggestion that the oath reaches only overt attempts to overthrow the government by force and violence seems illogical in light of Maryland's quite detailed provisions directed at sedition and subversion. If the oath reached only such overt activities, then it would be superfluous. Moreover, had the intent of the draftsmen been so limited, they could surely have used more precise language. Finally, the terms of the oath would presumably have been changed more radically than they have been following recent decisions of this Court, *e.g.*, *Yates* v. *United States*, 354 U.S. 298 (1957). Thus the only plausible reading of the oath carries its reach substantially beyond activities which this Court has held state governments may constitutionally proscribe. Such an oath may therefore not be required as a condition of public employment.

### B. Maryland Must Rely Upon Less Restrictive Means of Serving the Essential Purposes of the Oath

When a state seeks to justify use of a restriction or condition that strikes directly at First Amendment freedoms, it incurs a heavy burden. In a line of cases beginning with *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960), this Court has stressed that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Most recently, in *Keyishian* v. *Board of Regents, supra* at 602, this Court reaffirmed that principle, adding that "the principle is not inapplicable because the legislation is aimed at keeping subversives out of the teaching ranks." Maryland has not met the burden of justification in this case. Nor would it be easy for the State to do so, in view of the many direct sanctions and more specific forms of regulation found elsewhere in the Ober Law. Thus even if the oath certificate's terms were not unconstitutionally vague, the availability of less restrictive means for achieving the same purposes would independently invalidate the requirement.

### C. The Certificate Provides No Procedure by Which a Non-Signer Can Demonstrate His Fitness for Public Employment

Under section 14 of the Ober Law, a person who has once been appointed may not be discharged because of suspected disloyalty without a rather elaborate hearing. Neither in the certificate nor in the statute, however, are any such procedures provided for an applicant. Even a prospective employee for whom negotiations are complete, save for the oath (as was the case with this appellant), is given no opportunity to prove his loyalty or explain his reasons for refusing

to sign the oath. If he fails to sign at such a late stage, not only does he forfeit a position for which he is otherwise qualified, but even more serious, he suffers the stigma of having balked at the oath, however scrupulous may have been his reasons. The absence of such a procedure is equally harsh on the prospective employee who discovers the oath early in his quest for a Maryland state position; after such a discovery, he is unlikely ever to reach the stage at which he could even challenge the constitutionality of the oath requirement, as appellant has done here.

This Court has never reached the question whether due process requires some type of hearing before a non-signer may be disqualified solely because he will not sign a required oath. Procedural safeguards have generally been reserved for the incumbent, with far less solicitude shown for the applicant. But recent decisions of this Court point the way to a corresponding guarantee for the prospective employee who risks the stigma of a non-signer. *Slochower* v. *Board of Higher Education,* 350 U.S. 551 (1956), is particularly apposite. There the Court refused to permit New York to draw an automatic inference of disloyalty from an employee's invocation of the Fifth Amendment privilege against self-incrimination. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957), and *Konigsberg* v. *State Bar of California,* 353 U.S. 252 (1957), extended a comparable protection to applicants for admission to the bar who were suspected of disloyalty because of their refusal to disclose certain past associations.

On the basis of these precedents, a three-judge federal district court recently found Idaho's loyalty oath unconstitutional because it afforded no procedure by

which the non-signer might explain his actions and vindicate his loyalty. In *Heckler* v. *Shepard*, 242 F. Supp. 841, 845 (D. Idaho 1965), the court concluded that "no discharge of a public employee, which operates to bestow a 'badge of disloyalty' or to create a 'built-in inference of guilt; will be permitted without according the right to such hearing as is requisite to due process of law." The court acknowledged that a state may impose reasonable qualifications upon public employment. Yet before such employment is denied, "facts must first appear which bear some essential logical relationship to the prescribed standards, lest disqualification for employment be so unreasonable as to constitute a denial of due process of law." *Id.* at 845-846. The vice of the Idaho statute was the automatic and arbitrary nature of the disqualification: "[T]here is no concern for the employee's reasons; whether they are with or without justification; whether they are founded upon claimed constitutional guarantees. Even if a public employee holds steadfast conviction that the Federal Constitution shields him from being compelled to make the disclosures required, the Idaho statute affords but two alternatives: either to take the oath, or to suffer summary discharge from State employment." *Id.* at 846.

The Maryland statute is constitutionally vulnerable on just this ground. Here, as in *Slochower*, to draw an inference of disloyalty and disqualification from an unexplained refusal to sign—and without even affording an opportunity to explain—deprives the applicant of due process of law in the most basic sense. Thus Maryland's loyalty oath scheme is procedurally, as well as substantively, deficient.

## CONCLUSION

For the foregoing reasons, we respectfully urge this Court to hold Maryland's loyalty certificate, and the statutory provisions upon which it is based, unconstitutional under the First and Fourteenth Amendments. We offer, as our concluding statement, a portion of a letter which Professor Bentley Glass, former President of the Association, addressed to the then Governor of Maryland. This letter sought to explain why Professor Glass had declined an appointment to the Radiation Control Advisory Board of the State of Maryland because the appointment was conditioned upon signing the Maryland loyalty certificate. Among his objections to the oath were the following:

> I am . . . profoundly convinced that this law has done Maryland great harm already, and will do even more in the future, by preventing our state from securing the ablest leaders in education and political life. I know for a fact that some, and perhaps many, of our finest scientists and teachers chafe under the continuing insult to their integrity imposed by this requirement, and will leave at the first good opportunity. And I know that it has proved a severe hindrance in recruiting to state service able young men of independent mind and a love of freedom. The end of this road cannot lead anywhere but to an amassing of mediocrity in our colleges and universities and other schools, where daring original thought and courageous leadership are so vitally important to the public welfare. . . . The tempo of scientific and technological change is so rapid, and is accelerating so rapidly, that profound social changes are made necessary. In the present temper of America, any advocate of social change is quite certain to be labeled a Communist. Yet it is only by finding the right new ideas that our society can defend itself against

Communism and can prevent itself from being engulfed by Communism. I assert that we are doing almost everything we can to prevent America from arming herself with ideas. The Ober Act, and specifically the antisubversive requirement, is a prime example of the unwisdom of our action. *Bentley Glass on Test Oaths,* 46 A.A.U.P. Bull. 290, 291 (1960).

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